IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 948 of 1998
WITH
CRIMINAL APPEAL NO. 1020 OF 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RASIKBHAI GOPALBHAI PATEL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

Criminal Appeal No.948 of 1998
MR JM PANCHAL for the Appellant.
MR DABHI, APP, for the Respondent-State.

Criminal Appeal No.1020 of 1998

MR JOSHI FOR M/S THAKKAR ASSOC. for the Appellant.
MR DABHI, APP, for the Respondent-State.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 11/07/2007

ORAL JUDGMENT:-

(Per : A. L. DAVE, J.)

1. Present set of appeals arises out of a judgment and order rendered by the Sessions Court, Ahmedabad (Rural), Ahmedabad, on 19th August, 1998, in Sessions case No.22 of 1996.

1.1 The two appellants came to be tried by the Trial Court along with two other accused persons, namely, Nainaben, wife of Rasikbhai Gopalbbai Patel and Vinod alias Bako Ramubhai Patel. They all were tried for the offence of murder, attempt to commit murder, unlawful assembly, criminal intimidation, causing insult intended to provoke breach of peace and rioting while armed with deadly weapons, punishable under the Indian Penal Code ("IPC"). They were also tried for the offence punishable under Section 135 of the Bombay Police Act and the offences punishable under Sections 3(1)(x) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ["Atrocities Act" for short]. The Trial Court convicted Rasikbhai Gopalbhai Patel (original accused No.1) and Kishor alias Tijori Kunjbihari Sharma (original accused No.4) while acquitting original accused

No.2-Nainaben, wife of Rasikbhai Gopalbhai and Vinod alias Bako Shambhubhai Patel.

1.2 Both the convicts (original accused Nos.1 and 4) came to be convicted for the offence of murder under Section 302 read with Section 34 of IPC and were sentenced to imprisonment for life and a fine of Rs.500/-, in default, to undergo further imprisonment for a period of 30 days. They were also convicted for the offence of attempt to murder punishable under Section 307 read with Section 34 of IPC and sentenced to imprisonment for life. So far as original accused No.1-Rasikbhai Gopalbhai Patel is concerned, he was convicted for offence punishable under Section 504 of IPC and sentenced to undergo rigorous imprisonment for three months. For the offence under Section 506(2), he was convicted and sentenced to undergo rigorous imprisonment for one year and for the offence punishable under Section 135 of the Bombay Police Act, he was convicted and sentenced to undergo rigorous imprisonment for four months and a fine of Rs.100/-, in default, to undergo simple imprisonment for a period of 7 days. Original accused No.1-Rasikbhai Gopalbhai Patel and original accused No.4-Kishor alias Tijori Kunjbihari Sharma also came to be convicted for the offence punishable under Section 3(2)(v) of the Atrocities Act, but no separate sentence came to be awarded therefor by the Trial Court. Both of them were acquitted of the charges under Section 3(1)(x) of the Atrocities Act and Sections 3 and 7 of the Protection of Civil Rights Act.

1.3 Aggrieved by the said judgment and order, original

accused No.1-Rasikbhai Gopalbhai Patel has preferred Criminal Appeal No.948 of 1998, whereas original accused No.4-Kishor alias Tijori Kunjbihari Sharma has preferred Criminal Appeal No.1020 of 1998. No appeal is preferred by the State against the acquittal of original accused Nos.2 and 3.

2. Original accused No.1-Rasikbhai Gopalbhai Patel is represented by learned Advocate, Mr. J. M. Panchal, whereas original accused No.4-Kishor alias Tijori Kunjbihari Sharma is represented by learned Advocate, Mr. Haresh Joshi, appearing for M/s Thakkar Associates.

3. The prosecution case, as emerging from the record, is that the incident in question occurred on 8th September, 1995, around 21.30 hours, near Saraswati Society, located in Chandkheda area of Ahmedabad. It is the case of the prosecution that the four accused arraigned before the Trial Court along with an unidentified person formed an unlawful assembly with a common object to cause murder of deceased-Piyush Kantilal Makwana and also to murder Ashok Kantilal Makwana and, in furtherance of their common object, they committed assault while being armed with deadly weapon. It is the case of the prosecution that in furtherance of the common object, they picked up a quarrel with injured witness-Ashok Kantilal on the ground of his having gone to a particular Hair Dresser's shop for a hair cut. While this altercation was in progress, Ashok's brother, Piyush, intervened and there was, initially, a scuffle and then the attack, wherein it is alleged that both the appellants while being armed with knives committed

assault on Piyush Kantilal as well as Ashok Kantilal. The injuries caused on Piyush Kantilal were of serious nature which, ultimately, resulted into his death. The injuries caused on Ashok Kantilal were also of serious nature, which would have endangered his life but for timely treatment. It was alleged that these acts were committed by the assailants with knowledge that the victims belonged to Scheduled Caste/Scheduled Tribe. The Trial Court accepted the prosecution evidence against original accused No.1-Rasikbhai Gopalbhai Patel and original accused No.4-Kishor alias Tijori Kunjbihari Sharma and convicted them, as stated above.

3.1 The Trial Court, however, found that the evidence against original accused Nos.2 and 3 was not good enough to record conviction.

4. In order to prove the case, the prosecution has examined Kantibhai Manabhai, Ashok Kantilal and Parvatiben Ashokbhai as eye-witnesses. The prosecution has also relied on circumstantial evidence in the form of medical evidence, discovery of knife, dying declaration of Ashok, his deposition and Forensic Science Laboratory (FSL) report.

5. For the sake of convenience, original accused No.1-Rasikbhai Gopalbhai Patel, who is appellant in Criminal Appeal No.948 of 1998, is addressed to as Accused No.1 (A1) and original accused No.4-Kishor alias Tijori Kunjbihari Sharma, who is appellant in Criminal Appeal No.1020 of 1998, is addressed to as Accused No.4 (A4) in this judgment.

6. Learned Advocate, Mr. Panchal, contended that the origin and/or genesis of the incident is not disclosed by the prosecution and is, thus, suppressed by the prosecution. It was also contended by Mr. Panchal that the prosecution has not been able to show any motive, which would have prompted the appellants to commit the crime. It was also contended that the witnesses are family members and, therefore, they are interested witnesses. The evidence led by the prosecution through witnesses is suffering from basic infirmities. It was also contended that the version of the eye-witnesses, taken as a whole, would indicate that the eye-witnesses have a tendency to implicate more and more persons.

6.1 It was also contended that the Trial Court has believed the evidence of eye-witnesses, so far as their depositions in relation to original accused Nos.2 and 3 are concerned. It was contended that the incident is not separable nor is the evidence separable and has to be accepted as a single transaction and, if the version of the eye-witnesses is found to be unreliable in the same incident in respect of other accused persons, the same could not have been accepted by the Trial Court against the appellants. The evidence led by the prosecution rules out the possibility of presence of eye-witnesses relied upon by the prosecution. The version of the eye-witnesses does not get support from medical evidence. The medical evidence and the version of the eye-witnesses are inconsistent with each other. It was also contended that a test identification parade was held during the course of investigation where the eye-witnesses have identified the assailants. Two of them have not even been

arraigned as accused or prosecuted by the prosecuting agency. It was, therefore, contended by learned Advocate, Mr. Panchal, that the Trial Court committed an error in relying on the evidence of eye-witnesses and the medical evidence for recording conviction. He submitted that the appeal may, therefore, be allowed and the conviction may be set aside.

7. Learned Advocate, Mr. Joshi, submitted that the prosecution has changed its version from time to time. Initially, it was the case of the prosecution that the assault was committed by only two persons, then by three and then by four plus one. He submitted that, though two persons other than the accused arraigned before the Trial Court were identified by the witnesses to the incident as assailants, no further investigation in that direction is carried out nor have they been arraigned as accused. It was also contended that the prosecution has not acted in an honest and fair manner but has withheld the evidence as to T. I. parade. No independent witness is examined, though they were available. It was contended that independent witnesses, though available, have not been examined by the prosecution. The witnesses ought to have been examined by the prosecution to prove its case as there was no allegation of any collusion and such witness being not likely to support the prosecution. Witness-Kantilal Manabhai is the first informant. He has improved upon his F.I.R. while deposing before the Court. It was, therefore, contended that the investigation has not been fairly conducted nor is the prosecution fairly conducted and complete facts are not placed before the Trial Court. It was also contended that the evidence of two so called eye-

witnesses is conflicting *inter se*. The dying declaration of Ashok Kantilal was recorded, where he has not mentioned that present appellant-Accused No.4 had caused any injury to the deceased with knife. The said statement may not be treated as a dying declaration as, fortunately, Ashok has survived. The prosecution witnesses have deviated from their original version, so as to suit the requirement of the prosecution and, therefore, their evidence may not be relied upon. The foundation of the prosecution case so far as motive is concerned is a quarrel between Ashok Kantilal Makwana and the accused persons, but no investigation in that direction is carried out. It was also contended that no offence under Section 302 is said to have been proved against the said appellant-original accused No.4. The prosecution has failed to lead any evidence to show that A4 was also known by alias name Tijori. It was submitted that, if the Trial Court could not accept the evidence of eye-witnesses against A2 and A3, the Trial Court could not have accepted the evidence against A1 and A4. He, therefore, contended that the appeal may be allowed.

8. Learned Additional Public Prosecutor, Mr. Dabhi, has opposed this appeal. Mr. Dabhi submitted that the prosecution has established the identity of A4 as Kishor alias Tijori Kunjbihari Sharma through deposition of Ashokkumar Kantilal Makwana, who knew A4 as he did have a quarrel with him in past and he identified A4 as Tijori and, therefore, the contention that identity of A4 as Kishor alias Tijori is not properly established may not be accepted. It was also contended that the contention that independent witnesses are not examined also may not be accepted

for the reason that there are no other eye-witnesses to the incident, as can be seen from evidence Kantilal Manabhai Makwana, who said in his deposition that, after the incident was over, they raised shouts and, therefore, people from the society arrived. Therefore, those independent persons could not have been eye-witnesses to the incident and could not have carried the case of the prosecution any further. It was also submitted that Parvatiben implicates A4 as Kishor alias Tijori.

8.1 It was contended by learned Additional Public Prosecutor, Mr. Dabhi, that the Trial Court has considered the evidence threadbare and has not accepted that part of the evidence which was found by the Trial Court to be not reliable but has accepted that part of the evidence which it found to be reliable. Mr. Dabhi submitted that this is not impermissible. In fact, it is the duty of the Court to sift the evidence and find out the truth. Mr. Dabhi submitted that *falsus in uno and falsus in omnibus* is not the principle adopted by Indian Criminal Justice system and, therefore, the contention that because some of the witnesses' version is not accepted by the Trial Court against original A2 and A3, the Trial Court ought not to have accepted the evidence against A1 and A4 may not be accepted. It was contended that absence of motive will not be of any significance when there is direct evidence on occurrence. It was also contended that the trial Court has not awarded any separate sentence for the offence under the Atrocities Act. It was also contended that the discrepancies found in the evidence of eye-witnesses have to be accepted as natural lapses and may not be treated as an attempt to improve upon their own case to

suit to the requirement of the prosecution. It may be considered that one of the eye-witnesses is the father of the deceased and he has, in terms, stated in his deposition that he was disturbed because of the incident. Obviously, some discrepancies may have crept in his version that may have been given by him in the F.I.R. and the version that he may have given in the court, which is after lapse of a reasonable time, which would enable him to correct himself. The evidence in the form of FSL report supports the prosecution case where it is opined that the injuries were possible with the knife, although, during cross-examination, the doctor says that he cannot say for certain that they were caused with the knife. Mr. Dabhi submitted that in view of this, the Trial Court has rightly recorded conviction by sifting the evidence and this Court may not interfere with the said finding. He, therefore, submitted that the appeal may be dismissed.

9. We have examined the record and proceedings in light of the contentions raised by rival sides.

10. The prosecution has examined P.W.1-Kantilal Manabhai, P.W.4-Ashok Kantilal and P.W.17-Parvatiben Ashokbhai as eye-witnesses. They are at Exhibits 32, 40 and 82, respectively.

10.1 P.W.1-Kantilal Manabhai Makwana is the father of victim late Piyush Kantilal Makwana and injured witness Ashok Kantilal Makwana. He says that the incident occurred on 8th September, 1995 around 9.30 P.M. when he was at the house of his elder son, Ashok. The witness says that his house is in

Saraswati Society, located on Chandkheda I.O.C. Road whereas his elder son is staying in Block No.E-337 of Saraswati Society. He says that he and his younger son are staying together in Block No.B-111. He says that he went to the house of Ashok from his own house. He had learnt from members of the public that Ashok had a quarrel and, therefore, he went to the house of Ashok. There he was informed by wife of Ashok that Ashok had gone for a hair cut and, there, he had a quarrel with Rasik Patel and, therefore, he went to Police Chowky. The witness says that he then stayed back at the house of Ashok.

10.1.1 Thereafter, they heard a hubbub outside. Therefore, the witness, his son-Piyush and wife of Ashok came out of the house and saw that Ashok was caught hold of by Baka Patel (A3). Ashok had suffered knife blows on left side. In the meantime, Piyush arrived and original A2-Naina Patel said that this is his brother and he also should not be spared. This was told by Naina to original A4. A4, therefore, inflicted blows on Piyush on right side. They, therefore, raised shouts on seeing the occurrence. Thereafter, the people from the society came and the assailants-accused ran away. While leaving, they intimidated that they would be done to death. The witness says that he went to Police Station for lodging F.I.R. after making arrangements for taking the injured persons to Panchsheel Hospital in a jeep car. He did not go to the hospital. He gave F.I.R. in the Police Station and put his signature. The witness says that when he reached Vadilal Sarabhai Hospital, he learnt that his younger son-Piyush had died and Ashok was under treatment in the Casuality Ward. He was not permitted to go into

the room as the surgery was in progress. He says that he stayed in the hospital overnight and went home on the next day along with the P. S. I. He says that he showed the place of incident and the Panchnama was drawn in his presence. The witness has been cross-examined at length. A number of questions have been put to the witness during cross-examination on topographical aspect. During cross-examination, he sticks to his version that Piyush was caught hold of by Baka Patel (A3) and Tijori (A4) inflicted knife blows. He, however, states that only Tijori had inflicted knife blows on Piyush in the stomach. He admits that, in the F.I.R., he had not made any reference to presence of Baka or Vinod Shambhubhai Patel. During cross-examination, he states that he is aware about the T.I. parade having conducted. He says that he had gone along with Ashok and Budhabhai. The witness, during cross-examination, states that he had shown the place of incident to the police. He says that he did not remember if the police had shown the place which is seven feet away from the gate. He admits that there was blood on the gate. He says that he reached V. S. Hospital around 10.00 P.M. By that time, Ashok was already taken for surgery. He says that Ashok regained consciousness around 12.00 midnight. He does not remember whether Executive Magistrate had come to record dying declaration of Ashok. He admits that he saw Tijori for the first time on the day of the incident and he learnt through Naina that he is known as Tijori. He denies the suggestion that at the time of the incident, Naina had not referred to these names. He says that because of instigation being given by A2, repetitive knife blows were given by Tijori to Piyush on right side. He admits during cross-examination that he is disclosing, for the first time,

that Baka had caught hold of Piyush and Tijori had inflicted knife blows. He admits that Piyush had only one external injury. He says that he had noticed injury on chest. He is unable to state exact number of injuries suffered by Ashok. He admits that while giving F.I.R., he had not disclosed name of any of the witnesses.

10.2 Injured eye-witness, Ahsok Kantilal Makwana, is examined at Exhibit 40. He says that the incident occurred on 08.09.1995 around 8.00 P.M., but he is not able to give the exact time. He says that, after returning from job, around 5.30 to 6.00 P.M., he relaxed for a while and then went to his father's place and then returned and then he took his sons to a stall in the society to buy some biscuits. At that time, Rasikbhai Patel, Vinodkumar Patel, Tijori and Nainaben were sitting on a bench along with an unknown person. On seeing him, Rasikbhai Patel gave him abuses and called him, but he tried to avoid them. In the meantime, Tijori also abused him. At that time, he asked them as to why were they giving him abuses and what fault had he committed. At that time, Rasikbhai again abused him and asked him why did he come to that shop for a hair cut, to which he replied that he had never come to that shop and that he went to a shop in the opposite row. At that time, Nainaben said that she will not give any amount for the work of grill. He was warned by Rasikbhai to live quietly. Tijori told him to leave the business and be careful. The witness says that while he was about to park his scooter in front of his house, two unknown persons came and caught hold of him and Rasikbhai, Tijori and Nainaben rushed towards him. He says that he could not identify the unknown persons, but he says that he was caught hold of by

Vinodbhai. Initially, he was given kick and fist blows and then Rasikbhai Patel caused injury to him on chest on the left side. He says that, thereafter, Rasikbhai gave on more blow in the armpit. He says that Tijori also inflicted knife blows on Piyush. He identifies the weapons, which were allegedly used in commission of the crime. The witness has been cross-examined at length. He says that, after the first episode, i.e. of being abused by the accused side while he was going to buy biscuit for his sons, he went to Chandkheda Police and informed about the incident. Being informed, Constable, Bhagubhai, went to the place on the scooter of the witness and came back and advised the witness to inform the police in case of difficulty. He admits that when he saw the accused persons rushing, he had not noticed any knife. The witness denies the suggestion that while he was being caught hold of, he was given kick and fist blows. During cross-examination, he admits that several things which he had stated in the examination-in-chief were not disclosed by him before the police. Differently put, it is not established by the prosecution that he has not improved his original version. During cross-examination, he further admits that, after receiving the second blow, he raised shouts, hearing which, his father, brother and wife arrived at the spot.

10.2.1 He says that on 25th September, 1995, he was summoned at Dr. Jivraj Mehta Bhavan for T. I. parade. He says that he identified two persons from the persons arraigned. He says that he identified those two persons because he was asked by the Magistrate to identify the persons who were involved in the incident. He admits that those two persons are not arraigned as

accused.

10.2.2 He admits that, after receiving injury, he went alone to his father's house and, at that time, he came across Bhanukant Savjibhai. He does not remember if he told Bhanukant Savjibhai about the incient. He admits that till his statement was recorded on 9.9.1995, he did not know name and address of Tijori. He admits that wherever he referred to A4, he referred to him as Kishor Kunjbihari Sharma alias Tijori, in his police statement. He states that he does not know if name of A4 is Kishor Kunjbihari Sharma.

10.2.3 He admits during cross-examination further that, while his dying declaration was recorded, he did not know the details of injuries sustained by Piyush. He learnt about the injuries on Piyush only after he was discharged. He does not remember as to whether he had known or not about Tijori having knife in his hand while his dying declaration was being recorded. He denies that he was not aware about the details of weapon of Rasikbhai at the time of recording of his dying declaration.

10.3 The third eye-witness-Parvatiben Ashokbhai is examined at Exhibit 82. She says that the incident occurred about two years prior to the date of her deposing before the Court. The incident occurred during night. Her husband returned from service at around 5.00 P.M. Then he went to her in-laws' house and came back within half an hour and then took their young sons for buying biscuits. There 4-5 persons were sitting. She had not accompanied her husband, but when her husband came back, he told her that

Rasik Patel had threatened him and abused him and, therefore, he was going to the Police Chowky. The witness says that Rasik Patel, Bako, Naina, Tijori and one unknown person had threatened her husband. The incident occurred around 8.30 to 9.00 P.M. At that time, she was at her house. She heard a hubbub and, therefore, she, her father-in-law and brother-in-law came out. She found Rasik Patel attacking her husband. Her husband was caught hold of by Baka Patel and Rasik Patel inflicted knife blow on left side of the chest. Then her brother-in-law, Piyush, intervened and, therefore, Tijori inflicted knife blow on the right side of his chest. She denies the suggestion that she has not seen the incident.

10.3.1 The witness says that she rushed out of the house on hearing the hubbub. She does not know if other persons had gathered near the place of incident. Just as they moved out of the house, they saw Rasik Patel inflicting knife blow obliquely. She cannot exactly give details or description of the 5th person, who was present there, except that he was tall and thin. She says that when she and her father-in-law came out of the house, they saw the accused persons attacking her husband, but did not hear any altercation. She asserts that she saw Rasik inflicting knife blow. She knows Poonambhai, Jayeshbhai and Rakeshbhai staying in the society. She says that after the incident, she did not go to V.S. Hospital. Her husband was kept in the hospital for about 15 days. She, however, did not go there. She says that, she saw her husband, for the first time, after the incident when he was brought home. She is not able to give any answer as to what had happened to her husband while he was in hospital except that her husband

was in a critical condition. She says that she has lot of affection for her husband. She went to look after her husband after about 12 days. She says that she has wrongly stated that she had not gone to look after her husband till he was discharged. Several questions have been put to her to rule out the possibility of she having not been present at the time of actual occurrence, but she denies those suggestions. She says that there are street lights in the society. She asserts that muddamal article No.9-knife was in the hands of Tijori. She denies the suggestion that no assault was committed with the help of muddamal article No.9-knife on Piyush.

11. We have examined the evidence led by the prosecution as a whole. The prosecution has examined three witnesses, who posed as eye-witnesses. Before accepting their depositions, the Court has to examine whether the version given by them is true and dependable version or not and, for that purpose, other circumstantial evidence may be examined to assess whether they support the evidence of eye-witnesses or not. Examining the evidence of eye-witnesses as well as the circumstantial evidence will also enable the Court to assess whether the investigation is carried out properly, independently and without bias. We, therefore, propose to examine the evidence led by the prosecution as a whole in the context of lending support to each other.

12. The medical evidence in the form of depositions of Dr. Paresh Shah (Exhibit 44), Dr. Natwarlal Gupta (Exhibit 70) and Dr. Rathindra Deshmukh (Exhibit 53) besides the Inquest Panchnama (Exhibit 22) and the Postmortem Note (Exhibit 54) indicates that

the deceased had only one stab injury on his person. The knife which is discovered by A4 (muddamal article No.10) is found not to carry any blood as per FSL report.

12.1 The eye-witnesses attribute injuries found on person of injured eye-witness, Ashok, to A1-Rasik and injury found on person of the deceased to A4-Kishor alias Tijori. According to them, the deceased sustained injury below the nipple, as per eye-witness, Ashok, whereas his father-Kantilal has indicated that A4 inflicted knife blow to Piyush on right side and Parvatiben says that the knife blow was given on right side of the chest of the deceased. During cross-examination, Kantibhai says that A1 caused injury to Ashok with a knife on left side. He, however, admits to have stated in the FIR that both A1 and A4 inflicted knife blows on Ashok on left side, as a result of which Ashok fell down. In this context, if the postmortem notes are seen, it is found that one stab wound was found on the front of right chest at the lower medial end of right nipple, which was transverse with medial and slightly downward. The size of the wound was 5 cms. x 1 cm. Both the angles were acute and margins were sharply cut. There was a corresponding internal injury which was going deep into the thoracic cavity cutting the skin, S. C. tissue, chest muscles, right side 6th intercostal space, right pleura and had passed through the right side of diaphragm to enter abdomen. Superior part of right lobe of liver was also cut. Thus, Kantibhai, in his F.I.R., attributes injuries to both the appellants, but, later on, he attributes injury to the deceased to A4 and injuries to eye-witness, Ashok, to A1. This has to be looked from the angle that the deceased had only one stab

injury and no more, as attributed in the FIR and, therefore, the witness appears to have made a change in his version while deposing before the Court, to suit the medical evidence.

12.2 It is also to be noted that, according to the doctor, C.L.W. injuries were found on person of Ashok. The deposition of Dr. Natwarlal Gupta (Exhibit 70) indicates that he is not clear about the meaning of C.L.W. At one stage, he says that C.L.W. would mean Clean Lacerated Wound and then, at a later point of time, he says that C.L.W. means Contused Lacerated Wound. A contused lacerated wound can be attributed to a hard and blunt weapon, which is not attributed to any of the two appellants. It appears that the witness himself is not clear about the injuries. He expresses his identity to opine about type of weapon with which such injuries are possible. He is also unable to say as to whether the injuries were possible with muddamal article No.9-knife.

12.3 If the medical papers of injured eye-witness, Ashok, are seen, it is recorded that a history of stab injury was given to the doctor. Against that, no stab injury is found on his person. In this context, it is also worth to record that the doctor has expressed his inability to give any opinion as to whether injuries found on person of the injured eye-witness, Ashok, could be attributed to muddamal article No.9-knife. It may be noted that, as per the FSL report, the blood group of injured-Ashok was “O”, whereas the knife (muddamal Article No.9) was found to carry blood group “B”. It is also worth a note that muddamal Article No.9 is allegedly discovered by A1 and A1 is not attributed any injury caused to the

deceased, but to Ashok whose blood group is 'O'. The blood group of the deceased is not known because the sample which was sent to the FSL is reported to be unidentifiable groupwise but his bush-shirt carried blood group “B” and the knife, which is discovered by A4 carried no blood on it, as per the FSL report. Therefore, knife discovered by A4 carries no blood on it against allegation of injury to the deceased and the knife discovered by A1 carries blood of “B” group, which is not of injured Ashok, to whom he is alleged to have given knife blow.

12.3.1 Thus the version that is given by the eye-witnesses does not get support from either the FSL report or the medical evidence.

12.4 It is also worth a note that Panch witnesses, A. M. Gohil and Mehboobkhan Sherkhan Pathan, who are witnesses to the discovery of knife by A4, and Panch witnesses, Rumalji Kacharaji and Dilipbhai Nathaji, who are witnesses to discovery of knife by A1, have not supported the prosecution case and, thus, the discovery part of the prosecution story is not supported by independent witnesses. However, it is not even suggested that the discovery cannot be proved through police witnesses, but their depositions would call for a closer scrutiny.

13. Apart from the above aspects, we notice from the evidence that Ashok has stated that he had identified two persons in the T.I. parade as assailants, on being asked so to do by the Executive Magistrate. He has also admitted that those two persons who were identified by him in the T.I. parade have not been

arraigned as accused. Why they are not arraigned as accused is not explained by the prosecution. This would reflect seriously on quality of investigation and prosecution.

14. We notice that eye-witness, Ashok, has admitted in his cross-examination of having improved upon his original version as emerging from his statements before police recorded on 9.9.1995 and 15.9.1995. It also emerges from cross-examination of Ashok that after receiving injuries, he raised shouts and on hearing the shouts, his parents and his wife came to the spot. This would mean that the parents and wife of this witness reached the place after the incident. It also emerges from deposition of this very witness that soon after the incident, he met witness-Bhanukant Savjibhai and, at that time, he was all alone. Even witness-Bhanukant Savjibhai (Exhibit 34) also says the same thing. If the injured was caused such injuries in presence of his parents or his wife, he would not have been all alone after the incident when he met Bhanukant Savjibhai near his house. This raises doubt about presence of eye-witnesses, Kantibhai Manabhai Makwana and Parvatiben, wife of Ashok, at the place of offence.

15. We notice that A1 had injury on his person when he was arrested. This can be seen from the evidence of Dr. Punjabhai Chhaganbhai Patel (Exhibit 45). The doctor says that he had noticed three abrasions on the left side of the neck of the size 1.5 cms. x 0.5 cm., which were possible by nail. He was examined on 11.9.1995 and the injuries were old by three to four days. These injuries have not been explained by the prosecution. The evidence

of Dr. Punjabhai Patel indicates that the history given to him was that of a scuffle. This evidence taken at its face value would mean that there was a scuffle at the time of the incident, even as per the prosecution. If that is so, the evidence of eye-witnesses on genesis of the incident becomes doubtful because no witness speaks of any scuffle having taken place at the time of the incident.

16. We notice from the FSL report (Exhibit 30) that there are cut marks on right side and back of the shirt of Ashok, in respect of which there is no allegation. No injury is alleged to have been caused to Ashok on right side of the chest or on the back. Against that, Ashok has sustained injury on left side of the chest and there is no corresponding cut on his shirt on the left side front. This also makes the prosecution story doubtful. We are constrained to observe here that the Trial Court has, in its judgment, observed that the FSL report corroborates the oral evidence on the physical aspects of cuts having been found on the bush-shirt, which, in fact, is not correct, as discussed above. The finding by the Trial Court is erroneous to that extent.

17. We notice that the prosecution has tried to implicate more persons gradually. Firstly, in the case history given by injured-Ashok, no names were given and it is only indicated as stab by opposite party. Thereafter, in the F.I.R., two persons, i.e. A1 and A4 are implicated. Then, as the investigation progressed, further A2 and A3 (now acquitted) along with an unknown person are sought to be implicated by attributing instigation to A2 and participation in the form of holding Ashok to A3, which is not

believed by the Trial Court. It is also required to be noted that, during cross-examination, the Investigating Officer has admitted that the witness, Parvatiben, who posed as an eye-witness, has, in her statement before the police dated 9.9.1995, stated that on 8.9.1995, she learnt from others that her husband-Ashok had an altercation with Rasikbhai Gopalbhai Patel (A1), Tijori alias Sharma (A4), Vinod alias Bako Patel (A3), Rasik's wife, Naina(A2) and one unknown person. This would raise doubt about Parvatiben being eye-witness to the incident. This clearly shows a tendency on part of the prosecution witnesses to implicate more an more persons. And just the contrary, the investigating agency has not arraigned the two persons identified by Ashok in T.I. parade as assailants and no explanation is coming forth.

17.1 It has emerged from cross-examination of the Investigating Officer that, during investigation, the name of one Shambhubhai Rabari was indicated as assailant. This informaiton was received by the Investigating Officer through Control Room on phone. This was informed to the Investigating Officer by P.S.I. Gohil. But the Investigating Officer has admitted in paragraph 30 that he has not made any investigation on the question as to who gave information to P.S.I. Gohil and has stated there is no person named as Shambhubhai Rabari. Similarly, it was revealed during investigation through statement of Paluben Kantilal, mother of Piyushbahi, that she was also a witness to the incident, so also one Jayantilal Valchand Nai was a witness to the incident. One Mukeshkumar Mansingbhai Thakore was also a witness to the incident, as per the deposition of the Investigating Officer in

paragraphs 27 and 28, but these persons have not been examined as eye-witnesses.

18. We have read the judgment of the Trial Court. It is observed by the Trial Court in paragraph 33 of the judgment that the first informant and the eye-witnesses have shown a tendency to implicate more and more persons. It is observed by the Trial Court in paragraph 34 of the judgment that, eye-witness, Ashok Kantilal, identified Suresh Kantilal Nai and Narendra alias Pipo Rambhai Patel as assailants, however, they have not been arraigned as accused and, therefore, the depositions of the injured eye-witness and the first informant are not wholly reliable or trustworthy. But, in the second breath, it is observed by the Trial Court that the depositions are not totally unreliable at all. We also notice from the judgment of the Trial Court that the Trial Court has concluded in paragraph 32 that the evidence in respect of offence under the Atrocities Act is doubtful and that the offence is not proved to have been committed by the accused. Still, however, the Trial Court has recorded conviction under Section 3(2)(v) of the Atrocities Act while acquitting the accused of the offence under Section 3(1)(x). In our view, the entire episode has to be considered as a single incident and the acts cannot be considered as severable from each other and if the evidence is not trustworthy to be accepted to constitute offence punishable under Section 3(1)(x) of the Atrocities Act, obviously, the offence under Section 3(2)(v) could not have been held to have been proved.

19. It has come in evidence of the Investigating Officer that

he found blood at two places. It has also come in evidence that the house of Ashok and the house of deceased-Piyush, with whom the first informant was staying, are at a distance and the front of the house of Ashok is not visible from the house of Piyush. In the entire evidence it is indicated that the incident has occurred at one place, whereas the blood spots are found at two different places, for which no explanation is comingforth.

20. We find that the prosecution has not led any evidence on motive part. When the evidence has come that A1 had injury on his person, possibly caused in the incident in a scuffle, there is no evidence to show that there was even a scuffle. But evidence has come that abuses were flung. There were some utterances about not making payment for the grill. All these factors lead us to conclude that the genesis of the incident is not correctly brought before the Court.

21. On the version of the eye-witnesses, one more factor requires consideration. It has come in evidence that two persons were identified as assailants during T. I. parade and that those two persons are not arraigned as accused. If they were assailants, the eye-witnesses, in their deposition, ought to have attributed some overt act on their part or whatever role they played at the time of the incident. The eye-witnesses, during their deposition, have not even referred to those two persons. If they were not assailants, then the question arises as to why they were identified as assailants by the eye-witnesses. Either way, it becomes a matter of doubt whether the eye-witnesses are giving the correct version of the

incident or whether they were acting honestly at the time of T. I. parade. This would weaken the prosecution case.

22. The picture that, therefore, emerges from the overall consideration of the evidence is that possibility of the first informant and Parvatiben being not present at the place of incident cannot be ruled out. The possibility of the two persons identified in the T.I. parade being the real assailants cannot be ruled out. The prosecution version is changing from time to time about the identity of assailants and number of assailants. The medical evidence does not corroborate the version of eye-witnesses. The FSL report also does not support the version of the eye-witnesses about the number of injuries and the site of injury for want of corresponding cuts on the apparel of the injured persons. The medical evidence is also ambiguous on the aspect as to what the doctor means by CLW, whether Clean Lacerated Wound or Contused Lacerated Wound. The medical evidence is also not clear as to whether the contusion injury would be possible with a sharp edged weapon. The injury indicated by the injured while giving history to the doctor is stab injury, whereas what is found on his person are CLWs, which, in any circumstance, cannot be equated with a stab injury, whether as clean lacerated wound or as contused lacerated wound. The evidence of Ashok indicates that his parents and his wife arrived at the place upon his raising shouts after receiving the injuries. This rules out the possibility of Parvatiben and Kantibhai being present at the time and place of incident to witness the incident. The discovery witnesses have not supported the prosecution case. The Investigating officer, though having tried

to prove the discovery of weapon by the accused, cannot be given much weightage considering the nature of investigation carried out in the case. Even the Trial Court has come to a conclusion that the evidence of the first informant and the eye-witnesses is not reliable or trustworthy. The evidence qua A2 and A3 is disbelieved and, they are acquitted by the Trial Court. Involvement of A2 and A3 is in the same incident and in the same transaction as that of A1 and A4. The acts are not separable. Against the conclusion of the Trial Court recording acquittal, there is no appeal by the State. The prosecution witnesses have shown a tendency to add more and more persons as assailants.

23. In our view, with the above nature of evidence, it is risky to uphold the conviction recorded by the Trial Court. The appeals deserve acceptance. Both the appeals are allowed. The judgment and order of conviction and sentence rendered by the Trial Court, which is impugned in these appeals, is hereby set aside. The appellants-accused are acquitted of the offences with which they are convicted. Their bail bonds shall stand cancelled.

[A. L. DAVE, J.]

[S. D. DAVE, J.]

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